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SICOR LIMITED; ALCO CHEMICALS, LTD., Plaintiffs-Counter-Defendants-Appellants, and SICOR S.p.A., Counter-Defendant, v. CETUS CORPORATION; CETUS GENERIC CORPORATION; BEN VENUE LABORATORIES, INC.; BEN VENUE GENERIC CORPORATION; and ERBAMONT N.V., Defendants-Appellees, and CETUS-BEN VENUE THERAPEUTICS; ERBAMONT, INC.; and FARMITALIA CARLO ERBA, S.r.l., Defendants-Counter-Claimants-Appellees.

SICOR LTD. v. CETUS CORP.
No. 93-15667

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

51 F.3d 848; 1995 U.S. App. LEXIS 6614; 1995 Trade Cas. (CCH) P70,945; 95 Cal. Daily Op. Service 2392; 95 Daily Journal DAR 4180

July 12, 1994, Argued, Submitted, San Francisco, California. April 3, 1995, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. D.C. No. CV-91-01253-DLJ. D. Lowell Jensen, District Judge, Presiding.

COUNSEL: Douglas V. Rigler, Whitman & Ransom, Washington, D.C.; and Josef D. Cooper, Cooper & Kirkham, San Francisco, California, for the plaintiffs-counter-defendants-appellants.

Charles B. Cohler, Lasky, Haas, Cohler & Munter, San Francisco, California, for the defendants-counter-claimants-appellees.

JUDGES: Before: Herbert Y.C. Choy, Edward Leavy, and Andrew J. Kleinfeld, Circuit Judges. Opinion by Judge Leavy.

OPINION BY: LEAVY

OPINION

LEAVY, Circuit Judge:

Two foreign corporations filed the instant action in federal district court against several foreign and domestic companies, asserting federal antitrust claims and state law causes of action for breach of contract, interference with contractual relations, and indebitatus assumpsit. The district court entered summary judgment in favor of the defendants on all claims, and the plaintiffs have appealed. We affirm in part, reverse in part, and remand.

FACTS AND PRIOR PROCEEDINGS

Doxorubicin hydrochloride ("doxorubicin") is a chemical used in the treatment of some fourteen different types of cancer. Although it is one of the most effective and widely sold anti-cancer drugs available in the United States, it is also highly toxic in bulk form and must be specially prepared and packaged, or "finished," before it can be marketed in dosage form. Consequently, a distributor of bulk doxorubicin must obtain approval from the Food and Drug Administration ("FDA") of the

distributor's source (i.e., the manufacturer of the bulk doxorubicin) before turning it over to a finisher.

Erbamont N.V., a Netherlands Antilles company, once enjoyed a virtual monopoly on the sale of doxorubicin in the United States through its Italian subsidiary, Farmitalia Carlo Erba, S.r.l. ("Farmitalia"). Farmitalia, which had developed the techniques necessary to produce doxorubicin in commercial quantities, held an American patent on the drug's production until June 1988, as well as related patents on certain other production techniques until April 1991. Farmitalia marketed doxorubicin in the United States under the label Adriamycin exclusively through Erbamont N.V.'s wholly owned American subsidiary, Erbamont, Inc., and its Adria division (collectively, "Erbamont").

Shortly before the expiration of Farmitalia's product patent, another Italian firm, Sicor S.p.A., decided to enter the American market by manufacturing generic doxorubicin under an arrangement with its wholly owned United Kingdom subsidiary, Sicor Limited, which owned the microorganism from which doxorubicin is produced. As neither Sicor S.p.A. nor Sicor Limited (jointly, "Sicor") had an American presence or sales network, Sicor entered into a distribution agreement with Alco Chemicals, Ltd. ("Alco"), a U.K. corporation, and a finishing agreement

with Cetus-Ben Venue Therapeutics ("CBVT"),[1] a California partnership, in late 1987.

On February 1, 1988, Alco and CBVT executed a distribution agreement, dated as of November 5, 1987 ("Distribution Agreement"), in which Alco appointed CBVT to act as its exclusive American distributor of Sicor-manufactured doxorubicin to be finished by CBVT under the provisions of Sicor's contract with CBVT ("Supply Agreement"). In exchange for this exclusive arrangement, CBVT was to pay Alco $ 1,000,000 and distribution fees equal to 50% of CBVT's revenues from the sale of finished doxorubicin, net of CBVT's expenses in buying bulk doxorubicin under the Supply Agreement and various taxes, rebates, and other charges.

Farmitalia and Erbamont ("Farmitalia Group") responded immediately to this challenge to their dominant position in the United States market. In 1988, Erbamont unsuccessfully sought an injunction from the United States International Trade Commission ("ITC") against CBVT's importation of SICOR-manufactured doxorubicin on the ground of patent infringement. Shortly thereafter, CBVT

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[1]/CBVT was formed by two general partners, Cetus Generic Corporation ("CGC") and Ben Venue Generic Corporation ("BVGC"). CGC, a Delaware corporation with its principal place of business in California, was a subsidiary of Cetus Corporation, which also was a Delaware corporation based in California. BVGC, an Ohio corporation, is a subsidiary of Ben Venue Laboratories, Inc., a Pennsylvania corporation with its principal place of business in Ohio. In 1992, Cetus Corporation changed its name to Cetus Oncology Corporation following its acquisition by merger with Chiron Corporation. CGC remains a wholly owned subsidiary of Cetus Oncology Corporation.

filed an antitrust and unfair competition action against the Farmitalia Group in federal district court.

Meanwhile, Alco and CBVT amended the Distribution Agreement on April 10, 1989 ("First Amendment"). Among other things, the First Amendment modified the terms governing CBVT's payment of distribution fees to Alco and established a reimbursement account to fund CBVT's pursuit of antitrust claims against the Farmitalia Group. That same day, Sicor and CBVT entered into a superseding agreement, retroactively dated November 5, 1987 ("Second Supply Agreement"), separating Sicor's supply obligations from Alco's distribution commitments under the Distribution Agreement.[2] By letter agreement dated October 8, 1990 ("Second Amendment"), Alco and CBVT further amended the Distribution Agreement to permit CBVT to deduct from distribution fees owed to Alco 50% of CBVT's costs in pursuing its legal claims against the Farmitalia Group.

On May 25, 1989, CBVT made its first American sale pursuant to the Second Supply Agreement, thereby starting the running of the contract's three-year term. Between June 1989 and September 1990, CBVT made substantial inroads into Erbamont's dominant position in the American doxorubicin market. By underpricing its main competitor on sales of doxorubicin in both powder

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[2]/Although Sicor alleges that the two parties also orally agreed that CBVT would pursue its antitrust and unfair competition claims against the Farmitalia Group in consideration for Alco's payment of one-half of the associated litigation costs, the parties dispute the existence and enforceability of any such agreement. *See infra.*

and solution form, CBVT increased its market share from 0% to 30%. During this same time period, two smaller competitors held a combined market share of approximately 9%. Erbamont's market share declined correspondingly.

The Farmitalia Group did not ignore this competition. In addition to the failed ITC claim, Farmitalia initiated legal proceedings in Italy against Sicor, alleging theft of a proprietary microorganism essential to the production of doxorubicin. Although the action was eventually dismissed, Farmitalia obtained a temporary injunction against Sicor S.p.A.'s doxorubicin production facility in Milan on July 21, 1989. The plant remained closed until March 1990, when it reopened temporarily. On September 21, 1990, the plant was again shut down pursuant to an Italian court's sequestration decree. The plant has remained closed since then.

In response to the production halt at its plant in Italy, Sicor notified CBVT and sought to obtain supplies of bulk doxorubicin from other firms to meet its interim needs. On October 9, 1990, CBVT and Sicor met with Pharmachemie, B.V., a European distributor of Sicor-manufactured doxorubicin. Pharmachemie offered CBVT 2.4 kilograms of FDA-approved, Sicor-produced bulk doxorubicin. CBVT declined the offer, explaining that its inventory of Sicor-produced bulk doxorubicin would last until the following summer.

Meanwhile, Sicor and CBVT modified their supply arrangement by agreement dated October 8, 1990 ("Letter

Agreement").[3] The Letter Agreement revised the pricing formula for CBVT's purchases of doxorubicin and extended from 60 to 180 days the payment period for Sicor's invoices to CBVT. In addition, the Letter Agreement required CBVT to remit to Sicor 50% of its proceeds, net of various discounts and rebates, from sales of doxorubicin in the United States. Also pursuant to the Letter Agreement, the parties confirmed and ratified the remainder of the Second Supply Agreement.

In the meantime, Sicor sought an alternate producer to perform its contractual supply obligations. This search led to Mercian Corporation ("Mercian"), a Japanese company with prior FDA approval as a producer of bulk doxorubicin and an ongoing relationship with Sicor. Before Mercian could fill CBVT's orders from Sicor, however, CBVT would be required to obtain FDA approval as a finisher of Mercian-manufactured bulk doxorubicin, an administrative process with an expected time length the parties dispute: CBVT contended that FDA approval would take up to eighteen months, while Sicor estimated no more than five months. Accordingly, in late 1990, Sicor and Mercian began negotiating an agreement allowing Mercian to supply bulk doxorubicin in Sicor's stead under the terms of the Second Supply Agreement.[4]

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[3]/Not to be confused with Alco and CBVT's Second Amendment, also of that date. *See supra.*

[4]/The parties dispute whether these negotiations gave rise to a contract. *See infra.*

On January 25, 1991, Sicor shipped a 220-gram sample of Mercian-produced doxorubicin to CBVT to facilitate the latter's batch testing and preparation of an FDA application. Sicor expected CBVT to complete and file this application shortly after April 10, 1991, the expiration date of an adverse Farmitalia process patent. On February 22, 1991, CBVT outlined for Sicor various scenarios for launching sales of finished, Mercian-produced doxorubicin in the United States by as early as September 1991.

Meanwhile, CBVT was negotiating with the Farmitalia Group to settle its antitrust and patent suit against them and to secure an alternate source of bulk doxorubicin. CBVT disclosed these negotiations in a meeting with Sicor in March 1991. By letter received April 10, 1991, CBVT formally notified Sicor and Alco that CBVT and Erbamont had agreed to enter into an exclusive supply and distribution arrangement for Farmitalia-produced bulk doxorubicin, that CBVT had settled its litigation against the Farmitalia Group, and that CBVT would not be free to begin the bulk supply relationship contemplated by the parties.

On April 25, 1991, Sicor and Alco filed the instant action in federal district court against CBVT[5] and the Farmitalia Group, alleging breach of contract, tortious interference with contract, and unjust enrichment, as well as anticompetitive acts and monopolization of the Ameri-

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[5]/"CBVT" is here meant to include the Cetus Corporation, Cetus Generic Corporation, Ben Venue Laboratories, Inc., and Ben Venue Generic Corporation, as well as Cetus-Ben Venue Therapeutics. *See* note 1, *supra*.

can doxorubicin market in violation of federal law. On July 14, 1992, CBVT and the Farmitalia Group separately moved for summary judgment or, in the alternative, partial summary judgment on all claims. Following briefing and oral argument, the district court granted the motions for partial summary judgment on January 11, 1993, and entered final judgment pursuant to Fed. R. Civ. P. 54(b) two months later in favor of all defendants. Alco and Sicor have timely appealed.

ANALYSIS

I. *Federal Antitrust Claims*

A. Standard of Review[6]

We review de novo a district court's grant of summary judgment, applying the same standards as would the lower court. *Bassette v. Stone Container Corp.*, 25 F.3d 757, 759 (9th Cir. 1994). In opposing a motion for summary judgment in an antitrust case, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts[,]" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *i.e.*, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on

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[6]/While summary judgment has historically been disfavored in antitrust cases, *see High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987, 989 (9th Cir. 1993) (citing *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1171 (9th Cir. 1988)), this may no longer be so. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 586, 588 (1986); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991). Regardless of whether or not summary judgment is still disfavored in antitrust cases, we conclude for the reasons set forth in Part I.B. that summary judgment was appropriate on the appellants' antitrust claims.

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Thus, while the moving party has the initial burden of establishing the absence of a genuine issue of material fact, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), the nonmoving party must go beyond the pleadings and identify facts showing the existence of a genuine issue for trial. *Id.* at 324.

B. Discussion[7]

Sicor and Alco ("appellants") contend that the district court overlooked genuine issues of material fact as to whether the Farmitalia Group and CBVT (collectively, "appellees") committed anticompetitive acts injurious to competition and to the appellants in violation of Sections 1 and 2 of the Sherman Antitrust Act, 26 Stat. 209, ch. 647, §§ 1, 2 (July 2, 1890), *codified at* 15 U.S.C. §§ 1, 2. Each of these arguments will be discussed in turn.

1. The Section 1 Claim

[1] Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of

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[7]/The appellants' initial contention is that the district court failed to distinguish properly between "specific facts" and "substantial evidence," and thereby applied an incorrect legal standard for summary judgment in an antitrust case. *See T.W. Elec. Serv. v. Pacific Elec. Contrs. Ass'n*, 809 F.2d 626, 632 (9th Cir. 1987). Because the district court's grant of summary judgment was premised on its holding that there was no proof of any injury to competition, any error - if such it was - involving a confusion of "substantial evidence" with "specific facts" was clearly harmless.

trade or commerce among the several States[.] . . ." 15 U.S.C. § 1. "[T]o establish a claim under § 1 of the Sherman Act, the plaintiff must show 1) that there was a contract, combination, or conspiracy; 2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and 3) that the restraint affected interstate commerce." *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1410 (9th Cir.) (citing *T.W. Elec. Serv. v. Pacific Elec. Contrs. Ass'n.*, 809 F.2d 626, 632-33 (9th Cir. 1987)), *cert. denied*, 502 U.S. 994 (1991). In addition, the appellants must show that they suffered an injury resulting from the illegal conduct. *See Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1172 (9th Cir. 1988). Taking these requirements in turn, and viewing the record in the light most favorable to the nonmoving parties, we conclude that the appellants failed to allege and show that the conduct complained of unreasonably restrained trade.

[2] It is undisputed that the agreement between Erbamont and CBVT constituted a vertical arrangement between a supplier and a distributor of doxorubicin. "Vertical arrangements are almost always judged by the rule of reason. Under the rule of reason approach, the plaintiff must show an injury to *competition*, rather than just an injury to plaintiff's business." *Id.* (emphasis in original; citations omitted). Put somewhat differently,

> [T]he factual support needed to show injury to competition must include proof of the relevant geographic and product markets and demonstrations of the restraint's anticompetitive effects within those

> markets. Avoiding such market analysis requires proof of actual detrimental competitive effects such as output decreases or price increases.

Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 508 (9th Cir. 1989) (as amended; internal citations omitted).

The appellees contended below, and maintain on appeal, that the appellants did not meet their burden in opposing the motion for summary judgment because, *inter alia*, they failed to demonstrate an antitrust injury either to competition in general or to the appellants' business specifically. CBVT argued that the ability to market already finished doxorubicin produced by Erbamont would permit it to maintain customer goodwill and momentum while pursuing such approval. Agreeing with these contentions, the district court characterized CBVT's arrangement as being "pro-competitive," because (1) Erbamont's supply of doxorubicin enabled CBVT to remain in the market without any interruption in its business; (2) Sicor and Mercian remained free to try to sell their compound to other finisher-distributors in the United States; and (3) CBVT's arrangement with Erbamont had no apparent anticompetitive effect at the manufacturing level, and promoted (or at least did not discourage) competition downstream by preventing a reduction in the number of finisher-distributors in the American market.

[3] We agree. As a preliminary matter, it is apparent that CBVT's arrangement with Erbamont enabled it to

remain in the United States market and was thus procompetitive, notwithstanding Sicor's contention that CBVT did not lose that ability through any fault of Sicor's. Indeed, to hold as Sicor urges would result in a lessening of competition, since that would amount to a prohibition against CBVT's obtaining supplies of bulk doxorubicin elsewhere. Put another way, there was no harm to competition on account of the appellees' conduct, except for the Italian litigation which shut down Sicor's factory. Admittedly it hurt Farmitalia's would-be competitor, but Sicor had already been shut down by the Italian sequestration decree.

[4] Moreover, it is apparent from the materials before us that valid business reasons existed for CBVT's action, *i.e.*, CBVT's reason for buying from Farmitalia was to obtain the product, and Farmitalia's reason for selling that product to CBVT was to make money. In the absence of a showing of selling at a loss or similar conduct explainable only by a motive to reduce or eliminate competition, the appellants' claim is not persuasive.[8] *See High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993) ("If there is a valid business reason for [the defendant's] conduct, there is no antitrust liability.").

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[8]/While it is true as a general proposition that the existence of valid business reasons motivating a monopolist's conduct is ordinarily a question of fact, *see High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993), the absence of evidence to the contrary in the instant case is dispositive of this issue. *See also Matsushita*, 475 U.S. at 588 ("conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy").

Finally, the "technological complexities" argument advanced by the appellants in support of their contention that they faced insurmountable entry barriers to the American doxorubicin market is unconvincing. Such things constitute costs, obviously, but they are not barriers to market entry; indeed, the only barrier faced by Sicor prior to June 1988 was Farmitalia's patent. While the burden of FDA regulations might arguably constitute a barrier under some circumstances, the five-month delay argued by Sicor hardly rises to such a level.[9]

[5] As Justice Brandeis noted more than seventy-five years ago,

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918). Accordingly, and in light of the above, we con-

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[9]/Sicor's allegation that no other finisher-distributor would have been readily available to contract with Sicor or other potential foreign entrants into the American market at the supply level is arguably beside the point, for elimination of Sicor as a competitor would still leave the market essentially where it was before Sicor's entry, *viz.*, with two producers and three finisher-distributors.

clude that the district court did not err by granting summary judgment on the appellants' Section 1 claim.[10]

2. The Section 2 Claim

Under Section 2 of the Sherman Act, "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony[.] . . ." 15 U.S.C. § 2. A Section 2 monopolization claim requires proof of three things: First, that the Farmitalia Group possessed monopoly power in the relevant market; second, that the Farmitalia Group acquired or maintained that power willfully, rather than "'as a consequence of a superior product, business acumen or historical accident[,]'" *High Tech. Careers*, 996 F.2d at 989-90 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)); and third,

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[10]/Because of our holding on this point, we need not reach the merits of the appellants' contention that the district court erred by ruling that Sicor, as a mere middleman, lacked standing to assert a claim under federal antitrust law. *But see Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 488-89 (1968) (rejecting defense in Clayton Act case that middleman, in being able to pass overcharge on to consumers, was not truly injured and thus lacked antitrust standing); *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158, 1161 (9th Cir. 1991) (reversing denial of standing to advertising consultants earning commissions by serving as intermediary between advertisers and publishers), *cert. denied*, 112 S. Ct. 1947 (1992). With this said, however, we note that the district court did not base its holding on this conclusion, ruling instead that "the Court need not decide this issue because the Court GRANTS Erbamont's motion for partial summary judgment on the basis that there has been no proof of injury to competition."

that the appellants suffered a causal antitrust injury.[11] *See Christofferson Dairy*, 849 F.2d at 1174.

In keeping with these requirements, the appellants averred in their complaint that the appellees had succeeded in monopolizing the American market for doxorubicin; that this success arose from concerted unlawful actions, including unlawful interference with contractual relations between Sicor and Mercian, CBVT's breach of its supply and distribution agreements with Sicor and Alco, and CBVT's settlement of its antitrust action against the Farmitalia Group; and that the appellants suffered injury as a result.

[6] The district court granted summary judgment on the Section 2 claim for essentially the same reasons it rejected the appellants' Section 1 claim. Accordingly, affirmance is appropriate here as well. *See Williams v. I.B. Fischer Nevada*, 999 F.2d 445, 448 (9th Cir. 1993) (per curiam) (if conduct alleged in support of Section 1 claim is not deemed anticompetitive, same conduct alleged in support of Section 2 claim must also fail).

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[11]/A Section 2 claim of attempted monopolization, on the other hand, requires proof of four elements: "(1) specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir. 1988). As there was no showing of attempted monopolization on the part of the appellees, we will not further discuss this aspect of Section 2.

II. State Law Claims

A. Standard of Review

"Under California law, extrinsic evidence is admissible if relevant to prove a meaning to which the contractual language is reasonably susceptible." *Tamen v. Alhambra World Inv., Inc. (In re Tamen)*, 22 F.3d 199, 203 (9th Cir. 1994) (interpreting California law).[12] Where there is a dispute over a material fact deemed necessary to a contract's interpretation, based on evidentiary support for competing interpretations, summary judgment is inappropriate. *National Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983) (applying California law).

B. Discussion

1. Second Supply Agreement

[7] Sicor argues that CBVT breached the Second Supply Agreement by unilaterally terminating the contract without cause, notice, or providing an opportunity to cure. The district court rejected these contentions, based on its conclusion that no triable issue of fact existed on the question of a breach of the contract because the Second Supply Agreement required Sicor to supply doxorubicin to CBVT that had been manufactured exclusively by Sicor S.p.A. We disagree.

a. Cause for Termination

[8] While the Second Supply Agreement specifies that Sicor is to be the exclusive *seller* of bulk doxorubicin to be purchased and finished by CBVT in the United States, the contract is ambiguous as to whether or not Sicor is to be

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[12]/It is undisputed that California law governs the parties' claims.

the exclusive *manufacturer* of bulk doxorubicin sold thereunder. Section 1 of the Second Supply Agreement, for example, states that "SICOR agrees to sell Doxorubicin Hydrochloride conforming to the specifications set out in Appendix 1 to this Agreement . . . to CBVT on an exclusive basis." Neither section 1 nor Appendix 1 (i.e., the provisions defining the relevant product, bulk doxorubicin or "compound"), however, limits "compound" to doxorubicin manufactured by Sicor. Conformity with technical specifications, not manufacturing origin, are their exclusive focus.[13]

Under California law, a substantial quantum of inconsistency or ambiguity in a contract for the sale of goods is not a prerequisite to consideration of the parties' subse-

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[13]/We recognize, as did the district court, that section 5(a)(ii) of the Second Supply Agreement warrants in plain language that all compound sold under the agreement shall be "manufactured by Sicor S.p.A. in accordance with applicable manufacturing practice requirements." Further, we agree with the district court's conclusion that the warranty provisions in section 5(c) do not clearly support Sicor's interpretation of the contract. In that section Sicor warrants that "any COMPOUND which comes into its possession or control prior to delivery to CBVT shall not become in violation of the warranties and representations made in (a) and (b) at any time prior to the COMPOUND leaving its possession and control." The district court reasonably concluded that section 5(c) is inapplicable to shortfalls of the sort at issue here involving the quantity, as opposed to quality, of Sicor's deliveries.

While section 5(c) can be read to apply where a nonconforming shipment triggers Sicor's obligation under section 6(c) to use its best efforts to secure "Compound manufactured by an alternative manufacturer," sections 5(c) and 6(c) do not preclude Sicor from selling doxorubicin manufactured by a third party in other events, including production halts or shortfalls of the sort at issue here.

quent conduct. Under section 2202 of California's Commercial Code, terms of a contract involving the sale of goods "may be explained or supplemented . . . by course of performance." *Balfour, Guthrie & Co. v. Gourmet Farms*, 166 Cal. Rptr. 422, 426, 108 Cal. App. 3d 181, 187 (1980). More specifically, "any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement," Cal. Com. Code § 2208(1), subject to the proviso that "express terms shall control course of performance[.]" Cal. Com. Code § 2208(2).

[9] The record contains substantial evidence that CBVT acquiesced in or even agreed to Sicor's efforts to secure an alternate supplier. Sicor showed that CBVT participated in discussions with Sicor and Mercian, culminating in at least an agreement in principle, regarding the latter's interest in becoming an alternate supplier. Where competing factual inferences are equally plausible regarding the intentions of the parties to an ambiguous contract, summary judgment is inappropriate. *See Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 735 (9th Cir. 1986). The circumstances surrounding Sicor's discussions with Mercian permit conflicting and equally plausible inferences regarding the proper interpretation of the Second Supply Agreement. Accordingly, summary judgment was inappropriate on this issue.

b. Notice and Opportunity to Cure

[10] In addition, Sicor's conduct following the closing of its plant in Italy appears to be consistent with the contractual provision intended by the parties to cover supply

failures of the sort involved here, *viz.*, the *force majeure* clause in section 7 of the Second Supply Agreement. Section 7 provides that "neither party shall be liable or be in breach of any provision of this Agreement if and to the extent that any failure or delay on its part to perform any obligation hereunder is because of force majeure or any other cause beyond the reasonable control of such party." Section 7 defines such causes to include, *inter alia*, "legal restraints or actions imposed by governmental authorities." Facially, this provision could embrace an injunction or sequestration order, the forms of restraint at issue here.

Section 7 obligates the party restrained by *force majeure* to "move to eliminate the effect thereof to the extent possible." A triable issue thus exists as to whether Sicor, by seeking alternate sources of supply, was acting in conformity with this requirement when CBVT entered into an exclusive arrangement with Erbamont. Section 7 obligates CBVT to accede to such efforts on the part of Sicor, if made "with all reasonable dispatch," for at least one month. In addition, section 8(c) of the Second Supply Agreement requires the parties to meet in the event the condition of *force majeure* persists for one month or longer. Section 8 further provides that if "no settlement is concluded within two additional months regarding future course of action," the party not claiming *force majeure* may terminate the agreement upon written notice to the other party.

The record indicates that Sicor did not receive proper notice of termination as required by section 8(c) until

CBVT's letter of April 10, 1991.[14] In this letter CBVT informed Sicor that CBVT would no longer do business with Sicor or Mercian, in keeping with its newly negotiated exclusive relationship with the Farmitalia Group. The record further indicates that, by that date Sicor and CBVT may have agreed, consistently with section 7, to an arrangement whereby third-party suppliers and CBVT's own inventory would cover CBVT's interim needs until CBVT received FDA approval as a finisher of Mercian-produced doxorubicin. Such an agreement would preclude CBVT from withdrawing from the Second Supply Agreement without liability by terminating with notice pursuant to section 8 or cancelling the contract without notice on the basis of impossibility, frustration of purpose or failure to deliver under section 2711 of California's Commercial Code.[15]

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[14]/Prior to this letter, the only communication from CBVT arguably resembling a notice of termination was a letter dated December 6, 1990, from Cetus Corporation to Alco, stating that "we will continue, independently of your efforts, to seek and qualify alternative sources of bulk." Under California law, "[w]hile a notice of termination or cancellation of a contract for breach need not be formal and explicit, it should clearly indicate to the defaulting party that the injured party considers the contract terminated." *Whitney Invest. Co. v. Westview Dev. Co.*, 78 Cal. Rptr. 302, 308, 273 Cal. App. 2d 594, 603 (1969). The December 6, 1990 letter did not indicate with the requisite degree of clarity that CBVT intended to terminate the Second Supply Agreement.

[15]/Section 2711 provides in relevant part that, "Where the seller fails to make delivery . . . the buyer may cancel," in addition to recovering damages for nondelivery and seeking specific performance or replevy. Cal. Com. Code § 2711(1)(b), (2)(b).

Viewed in the context of Sicor's contemporaneous discussions with Mercian and CBVT's representation that its inventory of doxorubicin was not in danger of depletion in the short term, Sicor and CBVT's ratification of the Second Supply Agreement on October 8, 1990, potentially constituted or contributed to an agreement on a future course of action whereby Sicor, pursuant to section 7(c), retained Mercian as an alternate supplier. Viewed in the light most favorable to Sicor, the record permits the inference that Sicor pursued such alternate sources of supply with the "reasonable dispatch" required by section 7, given that Sicor met with Pharmachemie, B.V. for this purpose within three weeks of the sequestration decree imposed by the Milan court on September 21, 1990, and then met with Mercian to the same end shortly thereafter.[16]

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[16]/A similar triable issue arises as to whether the parties settled on a "course of action" pursuant to section 7 by virtue of negotiations held between Mercian and Sicor in 1990 and 1991 with the knowledge, if not participation, of CBVT; a memorandum, dated February 22, 1991, circulated between the parties regarding various "marketing scenarios" and launch dates for CBVT's finishing and sale of Mercian-manufactured doxorubicin; and contemporaneous assurances from CBVT that Mercian would be an acceptable alternate manufacturer.

Sicor contends that "[n]ot only did Cetus representatives participate in these discussions [with Mercian], they agreed in principle to an arrangement under which Sicor would supply a minimum of 18 kgs of Mercian-manufactured doxorubicin over a three year period." This contention was disputed in the pleadings but was sufficiently founded on declarations submitted by Sicor. Accordingly, a material and unresolved issue persists regarding whether Sicor and CBVT met one month or more after the *force majeure* arose in accordance with sections 7 and 8(c) and, within two months thereof, settled upon a course of action from which CBVT unilaterally deviated in breach of

Finally, the district court held that "plaintiffs can prove no damages resulting from the alleged breach because they have been incapable of competing in the U.S. bulk doxorubicin market since September of 1990." We find insufficient support in the record for this conclusion. Sicor raised a triable issue of fact as to whether, absent CBVT's termination of the Second Supply Agreement, Sicor could have continued to compete, receive compensation and profit as an intermediary between third party manufacturers and CBVT, notwithstanding the injunction and sequestration order.

[11] In light of the above, and in view of the unresolved questions of fact noted, summary judgment on Sicor's breach of contract claim was improper.

2. Oral Agreement

[12] Sicor next contends that the district court erred in granting summary judgment to CBVT on Sicor's claim that CBVT breached its oral agreement, entered into simultaneously with the Second Amendment to the Distribution Agreement, to pursue antitrust claims against Erbamont in exchange for Alco's payment of one-half of CBVT's associated litigation costs. Under sections 2(b) and 17 of the Distribution Agreement (as added by the First Amendment and modified by the Second Amendment, respectively), the parties agreed to fund equally the costs of litigation in defense of CBVT's right to distribute doxorubicin purchased under the Second Supply Agreement. Section 17 sets forth various accounting provisions

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section 8(c).

and other terms governing this litigation fund. Sicor contends that the oral agreement modifies section 17 to require CBVT to pursue its antitrust claims against the Farmitalia Group with the utmost diligence, and that CBVT breached this contract in settling its claims against the Farmitalia Group.

The district court found that the integration clause set out in section 10 of the Distribution Agreement, which provides that "[v]ariations, alterations and additions to this Agreement shall only be deemed to have become part of this Agreement when it is specifically stated that it has [sic] become part of this Agreement and has [sic] been signed by both parties[,]" effectively precluded consideration of extrinsic evidence of CBVT's agreement to litigate its antitrust claims fully. We disagree.

[13] Although the parol evidence rule ordinarily precludes consideration of additional terms where an integrated written contract exists, *see* 1 B. Witkin, *Summary of California Law*, § 268 at 263 (9th ed. 1987), the rule is inapplicable here. Under California law, the parol evidence rule does not "render inadmissible proof of contemporaneous oral agreements collateral to, and not inconsistent with, a written contract where the latter is either incomplete or silent on the subject, and the circumstances justify an inference that it was not intended to constitute a final inclusive statement of the transaction." *Ellis v. Klaff*, 216 P.2d 15, 19, 96 Cal. App. 2d 471, 476 (1950). Accordingly, the parties' inclusion of an integration clause in the written contract is but one factor in this analysis. *See Enrico Farms, Inc. v. H.J. Heinz Co.*, 629

F.2d 1304, 1306 (9th Cir. 1980) (per curiam) (citing *Masterson v. Sine*, 436 P.2d 561, 65 Cal. Rptr. 545, 68 Cal. 2d 222 (1968)).

To determine whether a document is an integrated contract not susceptible to modification by parol evidence under California law, we must consider three additional factors: "the language and completeness of the written agreement[,] the terms of the alleged oral agreement and whether they contradict those in writing, [and] whether the oral agreement might naturally be made as a separate agreement[.]" *McLain v. Great Am. Ins. Cos.*, 256 Cal. Rptr. 863, 867, 208 Cal. App. 3d 1476, 1484 (1989) (quoting *Mobil Oil Corp. v. Rossi*, 187 Cal. Rptr. 845, 851-52, 138 Cal. App. 3d 256, 266 (1982)).

[14] As to the first additional factor, section 17 does not specify in substantial detail the full range of the parties' obligations to assist one another in defending CBVT's right to distribute doxorubicin in the American market. For example, while section 17 describes fully the mechanics of deposit, withdrawal, and reimbursement, it is silent as to such essential antecedent issues governing when, whether, and to what extent CBVT would be obligated to pursue litigation triggering these provisions. With regard to the second factor, the parol terms proffered by Sicor supplement rather than contradict the accounting provisions in section 17. As to the third factor, the parties might have been expected to reduce to writing an agreement regarding the manner and circumstances in which one would be obligated to pursue jointly funded and mutually beneficial litigation. Notwithstanding this

third factor and the integration clause, however, we conclude that on balance the factors set forth in *McLain* militate sufficiently in favor of considering the additional, parol terms to shield Sicor from summary judgment on its claim that CBVT breached their oral agreement.

The district court gave as an alternative ground for its ruling that, even assuming the existence of such an oral contract, CBVT's promise would be void as a matter of public policy. In doing so, the district court cited Sicor's allegation in the complaint that "CBVT breached the oral agreement by settling all pending litigation against FARMITALIA and ERBAMONT and by agreeing to procure its supply of doxorubicin directly from defendant FARMITALIA." The district court characterized this statement as a judicial admission that the oral agreement obligated CBVT to litigate fully to judgment, an agreement that ran afoul of California's public policy favoring settlement. *See Bush v. Superior Ct.*, 13 Cal. Rptr. 2d 382, 388, 10 Cal. App. 4th 1374, 1385 (1992).

The district court is correct that a statement in a complaint may serve as a judicial admission. *See American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (1988); *Miller v. Lakeside Village Condominium Ass'n*, 2 Cal. Rptr. 2d 796, 803, 1 Cal. App. 4th 1611, 1623 (1991). Where, however, the party making an ostensible judicial admission explains the error in a subsequent pleading or by amendment, the trial court must accord the explanation due weight. *See Lacelaw*, 861 F.2d at 226 ("Factual assertions in pleadings and pretrial orders, *unless amended*, are considered judicial admissions conclusively binding

on the party who made them.") (emphasis added); *Hooper v. Romero*, 68 Cal. Rptr. 749, 753, 262 Cal. App. 2d 574, 580 (1968) (same). In opposing summary judgment, Sicor explained that, "By saying litigation to judgment, the parties did not mean that there would be no settlement[;]" rather, the parties intended only that CBVT would litigate its claims "fully and aggressively" and with Sicor's interests in mind.

[15] We conclude that Sicor retracted its judicial admission by subsequently recharacterizing the alleged oral agreement in its opposition to CBVT's motion for summary judgment. Accordingly, we must remand for consideration of whether the parties' oral agreement implicated the public policy invoked by the district court as an alternative ground in support of its erroneous grant of summary judgment on the oral contract claim.

3. Indebitatus Assumpsit

[16] The district court also rejected Sicor's claim seeking $ 500,000 in restitution to recover amounts Sicor alleged it had contributed to CBVT's litigation against Erbamont. Sicor argued that CBVT's settlement of the litigation with Erbamont was adverse to the appellants' interests and frustrated the purpose of their agreement to fund the litigation. The district court stated that the "claim of indebitatus assumpsit is entirely dependent on the claim of breach of the oral contract." Having ruled that the oral contract was unenforceable, the district court thus granted summary judgment to CBVT on Sicor's claim of indebitatus assumpsit. In light of our conclusion above that the district court should not have granted summary

judgment on Sicor's oral contract claim, the premise underlying the district court's ruling on the indebitatus assumpsit claim no longer exists. Accordingly, we must reverse and remand for reconsideration of this claim as well.

4. Intentional Interference With Contractual Relations and Prospective Business Advantage

Sicor's final contention is that CBVT intentionally interfered with Sicor's contractual and prospective business relations with Mercian by sending a letter to Mercian explaining that CBVT would no longer purchase doxorubicin from or through Sicor. Sicor argued that CBVT intervened with the intent to harm the appellants financially and to induce Mercian to breach its contract with them for the supply of doxorubicin. The district court granted summary judgment to CBVT on these two counts, ruling that, once Sicor was incapable of delivering Sicor-produced doxorubicin, CBVT was no longer under any contractual obligation to purchase bulk doxorubicin from the appellants, much less bulk doxorubicin manufactured by someone else.

[17] We agree with the district court that summary judgment was proper as to Count 6, Sicor's tortious interference with contractual relations claim. To recover for intentional interference with contractual relations under California law, a plaintiff must first show that it had a valid and existing contract. *Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys.*, 7 F.3d 1434, 1442 (9th Cir. 1993) (interpreting California law). The record does not support Sicor's claim that negotiations with Mercian "were

successful and the final terms of a supply agreement were outlined and mutually agreed upon and confirmed between SICOR and Mercian in telefax letters dated November 9, 1990 and December 3, 1990."

[18] Because Sicor did not present these two letters to the district court, we decline to discuss the merits of Farmitalia Group's contention that the letters contained conflicting material terms precluding the existence of a contract; and, as Sicor presented only conclusory allegations concerning the existence of a contract with Mercian, we affirm the district court's dismissal of Count 6.[17] *See Angel v. Seattle-First Nat'l Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981) ("A motion for summary judgment cannot be defeated by mere conclusory allegations unsupported by factual data.").

[19] In contrast, the district court's dismissal of Count 7, Sicor's claim for intentional interference with prospective economic relations, was error. The tort of intentional interference with prospective economic advantage extends liability to "'business relations or advantages which are merely prospective and ordinarily not the subject of an existing contract. The wrong consists of intentional and improper methods of diverting or taking business from another which are not within the privilege of fair competi-

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[17]/Sicor's failure to carry its burden of coming forth with some evidence to support its claim under Count 6 was not the basis for the district court's grant of summary judgment. Nevertheless, we may affirm a summary judgment on any ground finding support in the record, whether or not relied upon by the trial court. *Jewel Cos. v. Pay Less Drug Stores N.W., Inc.*, 741 F.2d 1555, 1564-65 (9th Cir. 1984).

tion.'" *Summit Mach. Tool*, 7 F.3d at 1442 (quoting 5 B. Witkin, *Summary of California Law*, § 652 at 740 (9th ed. 1988)). The otherwise similar elements of the two torts differ insofar as "'the existence of a legally binding contract is not a *sine qua non* to the maintenance of a suit based on the more inclusive wrong[,]'" *viz.*, interference with prospective economic advantage. 7 F.3d at 1442 (quoting *Buckaloo v. Johnson*, 537 P.2d 865, 869, 122 Cal. Rptr. 745, 749, 14 Cal. 3d 815, 823 (1975)).

[20] For purposes of opposing a Rule 56(c) motion, it is sufficiently evident from the record that Sicor and Mercian were engaged in serious negotiations promising to ripen from an agreement in principle into a binding contract. It is also apparent that CBVT was aware of, and perhaps active in, these negotiations. Sicor plausibly alleged that CBVT's letter to Mercian caused Mercian to break off the negotiations and resulted in injury to Sicor's business reputation, goodwill, and ability to compete in the American doxorubicin market. Therefore, we must reverse the district court's grant of summary judgment as to Count 7.

CONCLUSION

We affirm the district court's grant of summary judgment with respect to the Sherman Act claims, Counts 1 and 2, and as to the intentional interference with contractual relations claim, Count 6. We reverse the grant of summary judgment with respect to the remaining claims, set out in Counts 3, 4, 5, and 7, and remand for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each side will bear its own costs on appeal.

**[FILED JAN 11 1993
RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA]**

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

SICOR LTD., et al.	)	
	)	
Plaintiff,	)	
	)	Case No.
v.	)	C-91-1253-DLJ
	)	
CETUS CORP., et al.	)	ORDER
	)	
Defendants.	)	
	)	

On November 5, 1992, the Court heard arguments on defendant Cetus' motion for partial summary judgment on breach of contract claims, defendant Erbamont's motion for partial summary judgment on antitrust violations, and defendant Cetus' motion to strike portions of plaintiffs' declaration of Michael Cannon in opposition to Cetus' motion for summary judgment. Douglas Rigler and Daniel Press of Whitman & Ransom and Josef Cooper of Cooper and Kirkham appeared on behalf of plaintiff. Charles B. Cohler of Lasky, Haas, Cohler & Munter appeared for defendants the Cetus parties. Rollin Chippey of Brobeck, Phleger & Harrison, and David

Pritikin and Thomas Rein of Sidley & Austin appeared on behalf of defendants the Erbamont parties. Having considered the papers submitted, the applicable law, and the entire record herein, the Court hereby GRANTS defendant Cetus' motion for partial summary judgment on plaintiffs' breach of contract claims, GRANTS defendant Erbamont's motion for partial summary judgment on antitrust violation claims, and DECLINES to rule on defendant Cetus' motion to strike portions of plaintiffs' declaration of Michael Cannon in opposition to Cetus' motion for summary judgment.

BACKGROUND

I. Factual Background.

The factual background in this case is set forth in detail in the Court's April 16, 1992 Order. The following discussion therefore summarizes the facts most relevant to the motions now before the Court.

This case concerns the production and sale of doxorubicin hydrochloride ("doxorubicin"), the most widely sold anti-cancer drug in the United States. Doxorubicin can be used against 14 different types of cancer, making it one of the most effective anti-cancer drugs available. Sales of doxorubicin in the United States exceeded $100 million in 1988, 20% of the total sales of anti-tumor drugs in the United States.

Defendant Farmitalia Carlo Erba, S.r.l. ("Farmitalia"), an Italian corporation, originally developed the techniques necessary to produce doxorubicin in commercial quantities. It held the U.S. patent on the

production of doxorubicin until June 1988 and held related patents on certain production processes until April 9, 1991. However, Farmitalia has never sought patent protection on much of its production techniques. Instead it has attempted to retain its doxorubicin production techniques as trade secrets. Through 1988, Farmitalia and its related companies, Erbamont N.V. and Erbamont, Inc. (the "Erbamont Parties") were the only suppliers of doxorubicin to the United States market, which they sold under the name of Adriamycin.

Sometime prior to 1988, however, Sicor, S.p.A., an Italian corporation, also began to produce doxorubicin outside Milan, Italy, for sale in the United States. Around 1988, Sicor, Ltd. ("Sicor"), a wholly-owned British subsidiary of Sicor, S.p.A., entered into a contract with Cetus-Ben Venue Therapeutics ("CBVT"), an American drug retailer.[1] Under this agreement, Sicor agreed to supply CBVT with all of its doxorubicin needs from Sicor's Milan facility for three years, with Alco Chemicals, Ltd. serving as the distributor.

In 1988, Farmitalia filed an action with the United States International Trade Commission ("ITC") seeking to enjoin Sicor's importation of doxorubicin based on alleged patent infringement. The ITC ruled against Farmitalia on the claim.

[1/] CBVT is related to Cetus Corp., Cetus Generic Corp., Ben Venue Laboratories, Inc., and Ben Venue Generic, Inc. All references to CBVT include Cetus and Ben Venue.

In April 1989, CBVT filed an action against Farmitalia and Erbamont, Inc., alleging that they had engaged in unfair competitive practices and had violated antitrust laws in the sale and distribution of doxorubicin. CBVT was actively supported by Sicor and Alco Chemicals, with Alco Chemicals allegedly agreeing to pay half of the litigation costs and Sicor agreeing to set up a fund out of which a potential damage judgment would be paid.

Sicor lost control of its Italian production facilities in 1988, and thereafter entered into negotiations with the Mercian Corp. ("Mercian"), a Japanese drug manufacturing corporation, to supply CBVT with doxorubicin. Late in 1990, Sicor and Mercian concluded a supply agreement under which Mercian would supply doxorubicin pursuant to Sicor's agreement with CBVT.

CBVT, on the other hand, apparently concerned that its doxorubicin supply was not secure, soon entered into settlement negotiations with Farmitalia. In April 1991, CBVT announced that it had settled its action with Farmitalia and had entered into an agreement with Farmitalia wherein Farmitalia would exclusively supply CBVT with its doxorubicin needs. By so doing, CBVT refused to buy any more doxorubicin from either Sicor or Mercian pursuant to those supply agreements.

On April 25, 1991, plaintiffs filed this action. Sicor and Alco Chemicals claim that Farmitalia, CBVT, and their related corporations violated the Sherman Antitrust Act by shutting Sicor out of the doxorubicin supply

market. Sicor and Alco Chemicals also claim breach of contract, interference with contract, and list a cause of action for indebitatus assumpsit. They seek damages and injunctive relief. Defendants now move the Court for summary judgment on these claims.

II. Legal Standard.

Rule 56 governs motions for summary judgment. This rule states that summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e).

In a motion for summary judgment, "[i]f the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, 'specific facts showing that there is a genuine issue for trial.'" T.W. Electric Service, Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 (1983); Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir.), cert. denied, 107 S. Ct. 435 (1986)) (emphasis in original).

On cross motions for summary judgment, the burdens faced by the opposing parties vary with the

burden of proof they will face at trial. To succeed on summary judgment plaintiff must prove each element essential of the claims upon which it seeks judgment by undisputed facts. Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986) (party with burden "must establish beyond peradventure all of the essential elements . . ." (emphasis original)). In an influential article, Judge Schwarzer has phrased plaintiff's as follow: "Where the moving party has the burden [of proof at trial . . .,] his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 487-488 (1984).

In contrast, defendant' motion for summary judgment faces a lighter burden. Because the defendant does not bear the burden of proof at trial, the defendant need only point to the insufficiency of the plaintiff's evidence to shift the burden to the plaintiff to raise genuine issues of fact as to each claim by substantial evidence. T.W. Electric Service, Inc. v. Pacific Elec. Contractors Assoc., 809 F.2d 626, 630 (9th Cir. 1987) citing Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 (1983); Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir.), cert. denied, 479 U.S. 949 (1986). If plaintiff fails to raise a genuine issues of fact, then summary adjudication in favor of the defendant will be granted.

When considering the evidence in a summary judgment motion, the Court does not make credibility

determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the non-moving party. T.W. Electric, 809 F.2d at 630-31 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348, 1356 (1986)); Ting v. United States, 927 F.2d 1504, 1509 (9th Cir. 1991). Regardless of who is the moving party, each party must "establish the existence of the elements essential to [its] case, and on which [it] will bear the burden of proof at trial." Celotex Corp., 106 S. Ct. at 2552. The standard for deciding a motion for summary judgment is the same standard used to decide a motion for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2512 (1986).

In meeting their burdens of proof, each party must come forward with admissible evidence. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. See Falls Riverway Realty, Inc. v. Niagara Falls, 754 F.2d 49 (2d Cir. 1985); Thornhill Publishing Co. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979). Hearsay statements found in affidavits are inadmissible. See, e.g., Fong v. American Airlines, Inc., 626 F.2d 759, 762-63 (9th Cir. 1980). Plaintiffs must ultimately persuade the Court in opposing summary judgment that they will have sufficient admissible evidence to justify going to trial.

DISCUSSION
DEFENDANT CETUS' MOTION FOR SUMMARY JUDGMENT

I. Sicor's Breach of Contract Claim.

Defendants argue that plaintiffs' claim that CBVT breached the Supply Agreement by contracting with Erbamont to obtain bulk doxorubicin can be decided as a matter of law because the contract was already terminated by plaintiffs' prior material breach. According to defendants, plaintiffs materially breached the Agreement by becoming and remaining incapable of supplying CBVT with bulk doxorubicin manufactured by Sicor, S.p.A.

Sicor breached the contract because the Agreement required Sicor to supply doxorubicin manufactured exclusively by Sicor, S.p.A. to CBVT. Defendants cite paragraph 16 of the Complaint to support this proposition:

> Under the Supply Agreement, . . . [t]he actual manufacturer of the compound was agreed to be Sicor, S.p.A. whose production facility is located in Italy.

When the Sicor, S.p.A. doxorubicin manufacturing plant was shut down by the Italian government in September of 1990, plaintiffs became incapable of delivering the bulk doxorubicin manufactured by Sicor, S.p.A., and therefore breached the agreement.

Since plaintiffs had already breached the agreement, CBVT was excused from its obligations to plaintiffs under the then void agreement, and was therefore entitled to contract with Erbamont for an

alternate source of bulk doxorubicin. As the court in Lanvin, Inc. v. Colonia, Inc., 739 F. Supp. 182, 195 (S.D.N.Y. 1990), held: "[a] party may unilaterally terminate a contract where the other party has breached and the breach is material."

The Court agrees that Sicor materially breached the exclusivity provision of the Agreement when it became incapable of supplying doxorubicin manufactured in its Italian facility.[2]

Sicor argues that the language defendants cite, supporting their contention that only Sicor, S.p.A. doxorubicin was permitted, is limited to the quality of the compound in the warranty provisions of the Agreement. It was not meant to imply, and in no way suggests, that Sicor, S.p.A. was required to be the sole manufacturer of doxorubicin. Sicor's Opposition Brief at 8-10.

Contrary to Sicor's contention, the Court finds that the language of the Supply Agreement clearly states that Sicor, S.p.A. is to be the sole manufacturer under the Agreement:

2/ Sicor responds that it never breached the Agreement because it filled every purchase order for doxorubicin that CBVT requested as required by the Agreement. Plaintiffs' Opposition Brief at 6. CBVT argued and the Court agrees that CBVT should not be required to carry on a "futile charade of placing orders that everyone knew could not be met," when Sicor, S.p.A. was shut down. "The law neither does nor requires idle acts." Cal. Civ. Code § 3531 (West 1970). It was clear that Sicor was no longer able to manufacture doxorubicin with the closing of the Sicor, S.p.A. plant by the Italian authorities. Since CBVT was contractually obligated to purchase Sicor-manufactured doxorubicin only, CBVT should not have been required to place futile orders with Sicor for doxorubicin.

> All the COMPOUND sold under this Agreement is hereby warranted by SICOR as of the date of such shipment or delivery to be, on such date . . . (ii) manufactured by SICOR, S.p.A. in accordance with applicable manufacturing requirements.

Supply Agreement, ¶ 5(a) (emphasis added).

Plaintiffs' attempt to read paragraph 6(c) of the Supply Agreement as relieving Sicor, S.p.A. of its role as the exclusive manufacturer of doxorubicin untenable. Paragraph 6(c) of the Agreement states:

> If any failure by SICOR to supply COMPOUND that is in conformity with SPECIFICATIONS results in an inability of CBVT to meet customer demand . . ., then SICOR shall use its best efforts to assist CBVT by securing supply, on the same terms as set forth in this Agreement, of Compound manufactured by an alternative manufacturer which is reasonably acceptable to CBVT and is in possession of the requisite approval by the FDA . . . .

Supply Agreement, ¶ 6(c) (emphasis added).

In the face of the express language in paragraph 5(a), paragraph 6(c) is clearly limited to circumstances where plaintiffs might have supplied Sicor, S.p.A. bulk doxorubicin, but the doxorubicin technically failed to meet the stated specifications. Paragraph 6(c), authorizing the sale of doxorubicin from another manufacturer in limited situations, was clearly not intended to apply where

plaintiffs have become entirely incapable of delivering any doxorubicin manufactured by Sicor, S.p.A.

Accordingly, the Court finds that the express language of the Agreement indicates that Sicor materially breached the exclusivity provision prior to CBVT's contract with Farmitalia for bulk doxorubicin. CBVT's motion for partial summary judgment on the alleged breach of the Agreement is therefore GRANTED.

II. Sicor's Breach of Oral Contract to Litigate Claim.

Defendants next request the Court to grant their motion for summary judgment on plaintiffs' claim of breach an oral contract to litigate. Defendants argue (1) the parol evidence rule precludes evidence of an oral contract, (2) any such oral contract, even if proven, would be unenforceable as against public policy, and (3) plaintiffs could not recover from any alleged breach of an oral contact anyway because it suffered no damages.

The oral contract in dispute is alleged in the Complaint, which states:

> On or about April 10, 1989, plaintiffs and defendant CBVT entered into an oral agreement whereby plaintiffs agreed to contribute fifty percent (50%) of the legal fees and expenses incurred by CBVT in its anti-trust/unfair competition litigation against FARMITALIA and ERBAMONT. In return, CBVT agreed to fully litigate to judgment its anti-trust and unfair competition claims determining that FARMITALIA and ERBAMONT unlawfully protected a monopoly position

> with respect to the distribution and sale of doxorubicin in the U.S.

Complaint at ¶ 57 (emphasis added).

Defendants argue that no such oral contract was ever made, and if it was made, the parol evidence rule would bar evidence of such an oral agreement in the face of the written amendment to the distribution agreement entered into between the parties the very same day of the alleged oral agreement.[3]

Specifically, defendants contend that on the same day plaintiffs allege the oral contract was made, the parties entered into "an expressly integrated written contract with respect to the identical subject matter for the identical consideration which makes no mention of any such [oral] agreement," Defendants' Motion for Summary Judgment Brief at 19. It would have been unnatural for the parties to enter into a separate oral agreement without at least referencing the oral contract in the written agreement. The explicit integration clause in the written contract states that the Agreement

> together [with] the Supply Agreement, sets forth the entire understanding and agreement of the parties as to its subject matter and supersedes and replaces any and all prior negotiations, discussions or

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3/ The parole evidence rule states that where a written agreement exists, proof of a collateral oral agreement is permitted only if it "is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract." Masterson v. Sine, 68 C.2d 222, 227-28 (1968) (emphasis original).

agreements of the parties as to such subject matter, oral or written."

¶ 10 of the Distribution Agreement (emphasis added).

In response, plaintiffs argue that in determining whether a contract is fully integrated, the Court must look at whether the parties intended the writing to serve as the exclusive embodiment of their agreement. Masterson, 68 C.2d at 225. They claim that only part of the April 10, 1989 amendment to the Distribution Agreement was intended to be integrated. With respect to the terms of the agreement to litigate, no integration was intended. Plaintiff argues that it was natural for the parties to include only financial terms in the written agreement and to keep the other terms regarding cooperating in the litigation oral for ease of future modification.

The Court finds that plaintiffs have failed to present sufficient evidence in support of this argument. There is no evidence that the portion of the April 10, 1989 amendment to the Distribution Agreement dealing with financial terms was intended to be integrated, while the portion dealing with the agreement to litigate was not intended to be integrated. Absent ambiguity, the express integration clause in paragraph 10 of the Distribution Agreement governs. See Gruen Watch Co. v. Artists Alliance, 191 F.2d 700 (9th Cir. 1951) (Under California law, provisions of a contract as written govern construction thereof, in the absence of ambiguity.); Levi Strauss & Co. v. Aetna Cas. and Sur. Co., 237 Cal. Rptr. 473 (1986) (In construing a contract, the trial court's function is to ascertain and declare what is contained in the contract, and not to insert what has been omitted or what one of the parties now wishes were there.).

Even if evidence of the oral contract were permissible, defendants claim any such oral agreement would have been unenforceable as against public policy. There is a strong public policy in favor of settling cases and against litigating them. Hamilton v. Oakland School Dist., 219 Cal. 322, 329 (1933); Skulnick v. Roberts Express, Inc., 2 C.A.4th 884, 891 (1992); Stambaugh v. Superior Court, 62 C.A.3d 231, 236 (1976). In this case, the alleged oral agreement was "to fully litigate to judgment its anti-trust and unfair competition claims," Complaint at ¶ 57, against FARMITALIA and ERBAMONT in favor of attempting to settle the litigation.

In response, plaintiffs argue that the litigation agreement is not void as against public policy because it discourages settlement. The litigation agreement merely states that the parties were to "fully litigate to judgment" the antitrust claims so that both CBVT and the Sicor Parties could fairly compete in the U.S. doxorubicin market. It does not mean that there should be no settlement, but rather that the claims were to be litigated fully and aggressively in order to secure the stated goals for both CBVT and the Sicor parties, either by settlement or by trial. As plaintiffs explain, "CBVT's obligation was not to litigate without settling, but simply to consider Sicor and Alco's interests and cooperate with them in settling the litigation." Plaintiffs' Opposition Brief at 20.

The Court finds plaintiffs' attempts to construe the language of the oral agreement unconvincing. Defendants correctly point out that Sicor has recharacterized the oral agreement in terms inconsistent with the terms alleged in the original complaint. Paragraph 59 of the Complaint states:

> [O]n or about April 12, 1991, defendant CBVT breached the oral agreement by settling all pending litigation against FARMITALIA and ERBAMONT and by agreeing to procure its supply of doxorubicin directly from defendant FARMITALIA. (emphasis added)

Plaintiffs' original language in the Complaint is clearly at odds with Sicor's claims in its Opposition Brief. Thus, even if the alleged oral contract could be proven, it must be interpreted by plaintiffs' own admission as a contract to "fully litigate to judgment," which would be void as against public policy. To the extent that plaintiffs intended for the alleged contract to be an agreement "not to litigate without settling, but simply to consider Sicor and Alco's interests and cooperate with them in settling the litigation," the Court finds that plaintiffs' unarticulated and contradictory intentions to be uncontrolling.

Finally, defendants argue that an essential element in any claim for breach of contract is proof of damages resulting from the breach. In this case, plaintiffs can prove no damages from the alleged breach because they have been incapable of competing in the U.S. bulk doxorubicin market since September of 1990. The Sicor, S.p.A. plant was shut down by the Italian government well before CBVT settled its litigation with Erbamont; thus, Sicor could not have suffered any lost profits since it couldn't even manufacture or sell any doxorubicin.

In response, Sicor states that it has been damaged by Cetus' breach of the Agreement because had the litigation between Cetus and Erbamont resulted in a judgment against Erbamont, Erbamont's monopoly of the

U.S. doxorubicin market would have been broken up, Sicor may have been allowed to reopen its production plant, and Sicor would have been able to fully compete in the market.

The Court finds this chain of assumptions too speculative to be persuasive. Plaintiffs argue that:

> Had . . . [the anti-trust/unfair competition litigation] been tried before a trier of fact, it is more likely than not that said adjudication would have allowed CBVT to compete in the U.S. doxorubicin market. Plaintiffs would have directly benefitted from a decision in favor of CBVT because plaintiffs had an exclusive distribution and supply relationship with CBVT and because plaintiff's independent right to participate in the United States doxorubicin market would have been assured. Complaint at 15, ¶ 57 (emphasis added).

The Court finds that Sicor has failed to meet its burden of proof in raising a genuine issue of material fact with respect to this alleged breach of an oral contract to litigate. Accordingly, defendants Cetus' motion for partial summary judgment on Sicor's claim for breach of an oral contact to litigate is GRANTED.

III. Sicor's Indebitatus Assumpsit Claim.

Defendants next argue that Sicor's claim for "indebitatus assumpsit" can be decided as a matter of law because it is dependent on the existence of the alleged oral agreement, which defendants have previously argued is non-existent, unprovable, and/or unenforceable.

Plaintiffs seek $500,000 in restitution to recover the amount they allegedly paid to CBVT to support the litigation against Erbamont. They argue the express terms of the April 1989 Distribution Agreement Amendment require CBVT to use the funds for litigation costs. The money was not used for these expenses because the case settled, and CBVT has not returned the unspent funds. CBVT was therefore unjustly enriched.

> The Cetus parties settlement of the litigation with Erbamont in a manner adverse to the interest of the Plaintiffs clearly frustrated the purpose of the agreement to fund the litigation, which was to benefit Plaintiffs by requiring Erbamont to cease its anticompetitive actions.

Plaintiffs' Opposition Brief at 22.

Plaintiffs claim of indebitatus assumpsit is entirely dependent on its claim of breach of the oral contract discussed above. Since the Court held, supra, that plaintiffs have not sufficiently established the elements necessary to seek relief under a claim of breach of oral contract, they have also failed to meet their burden on their claim of indebitatus assumpsit. As defendants explain, "In the absence of an enforceable agreement that CBVT would use plaintiffs' contribution to fully litigate and not settle, there can be no finding that CBVT used the funds provided by plaintiffs for anything other than their intended purpose." Cetus' Motion for Summary Judgment Brief at 21. Defendants' motion for partial summary judgment on the issue of indebitatus assumpsit is therefore GRANTED.

IV. Intentional Interference with Contractual and Prospective Economic Relations.

According to defendants, Sicor's claim of intentional interference with contractual and prospective economic relations is also ripe for summary adjudication. The claim alleges that defendants intentionally interfered with contractual and prospective economic relations by failing to accept bulk doxorubicin arrangement from Mercian through Sicor.

CBVT responds and the Court agrees that CBVT is not and was never a party to a contract in which it was obligated to accept the proposed doxorubicin supply arrangement with Sicor and Mercian. Indeed, once Sicor became incapable of delivering Sicor, S.p.A. doxorubicin, CBVT was no longer contractually obligated to purchase any bulk doxorubicin from plaintiffs, much less bulk doxorubicin manufactured by someone other than Sicor, S.p.A.. CBVT was entirely free to enter into a contractual relationship with whomever it wished.

Plaintiffs dispute CBVT's contention that CBVT was under no obligation to accept non-Sicor, S.p.A. bulk doxorubicin from Sicor. According to Sicor, CBVT was obligated to accept doxorubicin from manufacturers other than Sicor, S.p.A. under the Agreement. The contract states that under certain conditions, Sicor may obtain bulk doxorubicin from alternative suppliers. This argument was addressed in this Order in Section I, supra, and the Court has held that the contract was an exclusive agreement in which CBVT was obligated to accept only Sicor, S.p.A.-manufactured doxorubicin. CBVT was never obligated to accept Mercian-manufactured doxorubicin. Accordingly, the Court GRANTS defendants' motion for partial summary judgment with respect to the claim of

intentional interference with contractual and prospective economic relations.

DEFENDANT ERBAMONT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs allege in their Complaint that defendants have violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Specifically, they claim defendants "have acted with specific intent and purpose to monopolize and have in fact monopolized the market for doxorubicin in the United States" by:

> a. . . . act[ing] to breach their supply and distribution agreements with plaintiffs thereby excluding plaintiffs from the bulk doxorubicin market in the United States;
>
> b. . . . act[ing] to interfere with plaintiffs' contractual relations with Mercian thereby depriving plaintiffs of the only alternative source of doxorubicin for the United States, and thereby excluding plaintiffs from the bulk doxorubicin market in the United States;
>
> c. . . . reach[ing] agreement to dismiss the antitrust action pending before this court and hav[ing] agreed to combine and contract together to exclude other competitors including plaintiffs from the bulk doxorubicin market in the United States.

Complaint at 10, ¶¶ 40-42. The Complaint goes on to state that the above acts were "intentionally and maliciously done for the express purpose of destroying the

business of plaintiffs and eliminating plaintiffs as competitors." Id. at 43. See generally Complaint at 10-13.

Defendant Erbamont brings this motion for summary judgment on the grounds that plaintiffs have no standing to allege these antitrust violations because (1) there is no injury to competition and (2) their alleged injuries are not antitrust injuries. For purposes of this motion, the parties agree the relevant market is the United States doxorubicin market and the plaintiffs' injuries are the lost profits from the terminated agreement between plaintiffs and defendants Cetus parties.

Erbamont argues and the Court agrees that there is no injury to competition in this case. In fact, Erbamont's supply of doxorubicin to CBVT was pro-competitive because Erbamont's stable supply of doxorubicin enabled CBVT to remain in the market without any interruption in its business. The presence of an additional competitor, thus increased competition in the U.S. doxorubicin market. In addition, neither Mercian nor Sicor was ever blocked from selling bulk doxorubicin in the United States; both parties were free at all times to try to sell the compound to another finisher and distributor of the drug. As the court in McGlinchy v. Shell Chemical Co., 845 F.2d 802, 812 (9th Cir. 1988), held, for the proposition that economic injury to a competitor does not equal injury to competition.

Erbamont next argues that plaintiffs injuries are not "antitrust injuries," i.e., they do not flow from that which would make defendants' acts unlawful under the antitrust laws. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) ("Plaintiffs must prove antitrust injury, which is to say injury of the type the

antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful . . . . It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'" (citation omitted)) (emphasis added); see also Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342-44 (1990) (antitrust injury requirement ensures that plaintiff can recover only if his loss stems from competition-reducing aspect or effect of defendant's behavior).

Specifically, Erbamont argues that plaintiffs have merely lost profits as middlemen who match doxorubicin suppliers, like Sicor, S.p.A. and Mercian, with doxorubicin finishers and distributors, like Cetus, and such lost profits do not constitute antitrust injury, especially when the loss is of "but one account." Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266, 274-75 (5th Cir. 1979); see also Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549, 558 (7th Cir. 1980) ("[A] loss by the plaintiff of a single contract with a single purchaser is simply not equivalent to a deleterious effect on the market. . . . [T]here must be some allegation of a harmful effect on a more generalized market . . .).

The Court finds that to the extent the alleged injury to competition is the loss profits of a middleman, no injury protectable under the antitrust laws has been established. See HyPoint Technology, Inc. v. Hewlett-Packard Co., 949 F.2d 874, 878 (6th Cir. 1991). However, the Court need not decide this issue because the Court GRANTS Erbamont's motion for partial summary judgment on the basis that there has been no proof of injury to competition.

DEFENDANT CETUS' MOTION TO STRIKE

Defendant Cetus also brings a motion to strike portions of the declaration of Michael Cannon in plaintiffs' opposition to Cetus' motion for summary judgment ("the Cannon declaration"). Specifically, defendant argues that portions of the Cannon declaration are conclusory and argumentative. In addition, defendant argues that the declaration submitted by plaintiff is improper under the Federal Rules of Civil Procedure.

The Federal Rule of Civil Procedure 12(f) provides that "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Rule 56(e) requires that affidavits include only facts that would be admissible in evidence. 10A Wright, Miller, and Kane, Federal Practice and Procedure § 2738, at 474 (1983) (hereinafter "Wright and Miller") ("Because the policy of Rule 56(e) is that the judge should consider any material that would be admissible at trial, the rules of evidence and the exceptions thereto determine what averments the affidavit may contain.").

Generally, any doubts as to the quality of the materials submitted in support of a summary judgment motion are resolved against the moving party. Wright and Miller, § 2738, at 438. See also Lew v. Kona Hospital, 754 F.2d 1420 (9th Cir. 1985) ("[A]s a general principle, we treat the opposing party's papers more indulgently than the moving party's papers. Doff v. Brunswick Corp., 372 F.2d 801, 804 (9th Cir. 1966) (referring to the "rule of liberal construction of a counter affiant's papers")).

The Court has considered defendant Cetus' motion to strike in so far as it affects the foregoing motions. The

Court finds that it is unnecessary to decide this issue and accordingly DECLINES to rule on Cetus' motion to strike.

CONCLUSIONS

For the foregoing reasons, the Court ORDERS as follows:

1. Cetus' motion for partial summary judgment on plaintiffs' claim for breach of the written Agreement is GRANTED.

2. Cetus' motion for partial summary judgment on plaintiffs' claim for breach of the oral contract to litigate is GRANTED.

3. Cetus' motion for partial summary judgment on plaintiffs' claim of indebitatus assumpsit is GRANTED.

4. Cetus' motion for partial summary judgment on plaintiffs' claim of intentional interference with contractual and prospective economic relations is GRANTED.

5. Erbamont's motion for partial summary judgment on alleged violations of 15 U.S.C. §§ 1 and 2 is GRANTED.

6. The Court declines to rule on Cetus' motion to strike portions of the declaration of Michael Cannon in plaintiffs' opposition to Cetus' motion for summary judgment.

7. Defendants shall prepare and file a proposed form of judgment within 30 days of the date of this Order. Plaintiffs shall have 30 days to file an opposition to the proposed judgment. The Court will then consider the proposal and any opposition and issue a final judgment in this case.

IT IS SO ORDERED.

Dated: January 11, 1993

//S//
D. Lowell Jensen
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SICOR LIMITED and ALCO CHEMICALS, LTD., Plaintiffs, v. CETUS CORPORATION; CETUS GENERIC CORPORATION; BEN VENUE LABORATORIES, INC.; BEN VENUE GENERIC CORPORATION; CETUS-BEN VENUE THERAPEUTICS; ERBAMONT N.V.; ERBAMONT, INC.; and FARMITALIA CARLO ERBA S.r.l., Defendants.	**[FILED MAR 12 1993 RICHARD W. WIEKING, CLERK]** Civil Action No. C-91-1253-DLJ
ERBAMONT INC. and FARMITALIA, CARLO ERBA S.r.l. Counterplaintiffs, v. SICOR LIMITED; ALCO CHEMICALS, LTD. and SICOR S.p.A., Counterdefendants.	FINAL JUDGMENT OF DISMISSAL OF PLAINTIFFS' CLAIMS **[ENTERED IN CIVIL DOCKET MAR 19, 1993]** Hon. D. Lowell Jensen

The Motions for Summary Judgment of Dismissal of the Complaint by Erbamont N.V., Erbamont, Inc., and Farmitalia Carlo Erba S.r.l. (hereinafter referred to collectively as "the Erbamont Parties") and by Cetus Corporation, Cetus Generic Corporation, Ben Venue Laboratories, Inc., Ben Venue Generic Corporation, and Cetus-Ben Venue Therapeutics (hereinafter referred to collectively as "the Cetus Parties"), including the Cetus Parties' express joinder in the companion motion by the Erbamont Parties, having been served and filed on July 14, 1992, the motions having been fully briefed and having come on for hearing before the Honorable D. Lowell Jensen, United States District Judge, on November 5, 1992, and having then been submitted, and the Court being fully advised in the premises.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that each such motion is granted in full and the complaint is dismissed as against all defendants;

IT IS FURTHER ORDERED, the Court expressly finding that there is no just reason for delay, that pursuant to Fed. R. Civ. P. Rule 54(b), the Clerk shall enter this judgment as a final judgment as to all claims of the Plaintiffs against the Defendants.

IT IS SO ORDERED, this 12th day of March, 1995.

//S//
D. Lowell Jensen
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SICOR LIMITED and ALCO CHEMICALS, LTD., Plaintiffs, v. CETUS CORPORATION; CETUS GENERIC CORPORATION; BEN VENUE LABORATORIES, INC.; BEN VENUE GENERIC CORPORATION; CETUS-BEN VENUE THERAPEUTICS; ERBAMONT N.V.; ERBAMONT, INC.; and	* CIVIL ACTION * NO. C-91- * 1253-DJL * * (FILED UNDER * SEAL) * * DECLARATION * OF DOUGLAS V. * RIGLER IN * OPPOSITION TO * THE ERBAMONT * PARTIES'

FARMITALIA CARLO ERBA S.r.l., Defendants.	* MOTION FOR SUMMARY JUDGMENT
ERBAMONT INC. and FARMITALIA, CARLO ERBA S.r.l. Counterplaintiffs, v. SICOR LIMITED; ALCO CHEMICALS, LTD. and SICOR S.p.A., Counterdefendants.	* DATE: September 30, 1992 * TIME: 10:00 am * PLACE: Court-room 3

I, Douglas V. Rigler, declare as follows:

1. I am an attorney licensed to practice in the District of Columbia and am a partner in the law firm of Whitman & Ransom, counsel of record for the Sicor Parties in this litigation. I have personal knowledge of the facts stated herein, and if called as a witness, I would and could competently testify to the matters stated herein. I submit this declaration in opposition to the Erbamont Parties' motion for summary judgment.

2. Attached hereto as Exhibit 1 is a true and correct copy of the Declaration of Michael D. Cannon.

3. Attached hereto as Exhibit 2 is a true and correct copy of the Declaration of John C. Beyer, Ph.D. Attachment A to Dr. Beyer's Declaration is a true and correct copy of pages from a document produced in

discovery by the Cetus Parties. Attachments B-D to the Declaration of Dr. Beyer are true and correct copies of pages from documents produced in discovery by the Erbamont Parties.

4. Attached hereto as Exhibit 3 is a true and correct copy of pages from the Deposition of James E. Rurka of August 27, 1992.

5. Attached hereto as Exhibit 4 is a true and correct copy of pages from the Petition for Review of Action of the United States Food and Drug Administration: Brief for Respondent, produced in discovery by the Erbamont Parties.

I declare under penalty of perjury under the laws of the United States of America that each of the foregoing statements is true and correct.

Executed this 15th day of September, 1992 in Washington, D.C.

//S//
Douglas V. Rigler

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Exhibit 1
to Rigler
Declaration

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SICOR LIMITED and ALCO CHEMICALS, LTD., Plaintiffs,	* CIVIL ACTION * NO. C-91- * 1253-DJL
v.	*
CETUS CORPORATION; CETUS GENERIC CORPORATION; BEN VENUE LABORATORIES, INC.; BEN VENUE GENERIC CORPORATION; CETUS-BEN VENUE THERAPEUTICS; ERBAMONT N.V.; ERBAMONT, INC.; and	* (FILED UNDER * SEAL) * * DECLARATION * OF MICHAEL D. * CANNON IN * OPPOSITION TO * THE ERBAMONT * PARTIES'

FARMITALIA CARLO ERBA S.r.l., Defendants.	* MOTION FOR * SUMMARY * JUDGMENT
ERBAMONT INC. and FARMITALIA, CARLO ERBA S.r.l. Counterplaintiffs, v. SICOR LIMITED; ALCO CHEMICALS, LTD. and SICOR S.p.A., Counterdefendants.	* DATE: September * 30, 1992 * TIME: 10:00 am * PLACE: Court- * room 3

I, MICHAEL D. CANNON, declare as follows:

1. This declaration is made on my own personal knowledge, and if called to testify, I could competently testify to the matters stated herein.

2. My name is Michael D. Cannon and I am employed by Alco Chemicals, Ltd. ("Alco") as manager for new product development, and by Sicor, S.p.A. as marketing manager and have been at all times relevant to this action. I make this Declaration in Opposition to the Motion for Summary Judgment of the Erbamont Parties.

3. Sicor Limited is party to a contract with Alco Chemicals, Ltd., which gives Alco exclusive distribution rights in certain countries including the United States with respect to doxorubicin manufactured

by Sicor S.p.A. Sicor S.p.A. manufactured bulk doxorubicin under a tolling arrangement with Sicor Limited, which owned the daunorubicin producing microorganism, from which doxorubicin is produced.

4. With the expiration in June 1988 of the Farmitalia product patent for doxorubicin, Sicor, S.p.A., Sicor Limited (Sicor's S.p.A. wholly owned UK subsidiary), and Alco Chemicals, Ltd. determined to enter into competition for the sale of doxorubicin in the United States market. Prior to the expiration of the patent, the Erbamont Parties (acting through Farmitalia Carlo Erba, S.r.l., ("Farmitalia") as the manufacturer, and Erbamont, Inc. as the United States distributor) enjoyed a monopoly in doxorubicin, which is the most widely prescribed anticancer drug in the United States.

5. Sicor is a chemical company which manufactures pharmaceutical active ingredients and which has a broad range of generic products, but it had no distributor for doxorubicin products in the U.S. Accordingly, Sicor and Alco began to look for a method of marketing doxorubicin in competition with Erbamont.

6. It was difficult to obtain a United States finisher and distributor for Sicor-supplied doxorubicin due to what plaintiffs found to be significant barriers to entry. Both the bulk form and the finished form of doxorubicin have to be approved by the United States Food and Drug Administration ("FDA") before the finished product can be marketed. Because Sicor's production facilities are operated in compliance with Good Manufacturing

Practices, Sicor did not anticipate undue difficulty in obtaining FDA approval for its bulk doxorubicin. Such approval was granted on December 20, 1988.

7. I note that in paragraph 16 of his declaration, Mr. Russillo, President of Ben Venue Laboratories, Inc., admits that even as late as 1991 CBVT [Cetus Ben Venue Therapeutics] "was unable to obtain for resale in the United States finished doxorubicin manufactured by any other drug finisher."

8. Although doxorubicin is effective against cancer, it also is a highly toxic drug even in small quantities. During the entire course of therapy, a single patient is rarely administered more than a half a gram of the drug. Accordingly, Sicor had to find a company in the United States with the capability of handling highly toxic substances, and producing sterile vials containing either a solution or lyophilized (freeze dried) product, and thereafter of marketing and distributing it. Among the American pharmaceutical industry, only three companies were identified as having the necessary capabilities. The primary reason for the limited number of qualified companies is the fact that most pharmaceutical companies simply do not include the lyophilizing of toxic drugs in their manufacturing capabilities.

9. The three companies identified by Sicor and Alco with the necessary capabilities were: Lederle, Lymphomed, and Ben Venue Laboratories in conjunction with Cetus Corporation as the marketing and distributing arm.

10. Lederle is a major name-brand marketer. It had little interest in entering into the generic market in conjunction with Sicor. Thus, the only potential entries into the U.S. market were either Cetus/Ben Venue or Lymphomed. During discussions it turned out that Lymphomed was not interested except at unacceptable terms. Thus there was only one available U.S. finishing and distribution outlet for Sicor to compete in the U.S. market.

11. Effective November 5, 1987, Sicor entered into a Supply Agreement with CBVT. Effective the same date, Alco entered a Distribution Agreement permitting CBVT to sell and distribute doxorubicin supplied by Sicor. Sicor received FDA approval to market bulk doxorubicin in the United States on December 20, 1988. CBVT thereafter obtained FDA approval for the sale of finished Sicor doxorubicin in March 1989.

12. In 1989, Sicor entered the U.S. market for doxorubicin through CBVT's sale of finished Sicor doxorubicin as a generic product. Sicor's bulk doxorubicin was consistently of high quality; CBVT never rejected any Sicor bulk or complained about any aspect of the product.

13. According to the terms of the Supply and Distribution Agreements, Alco and Sicor were entitled to 50% of CBVT's revenues following the sale of finished Sicor doxorubicin in the market. Sicor and Alco were only paid for doxorubicin that was actually sold. They were not paid for bulk doxorubicin lost in the manufacturing process. The effect of this pricing

arrangement was to enable CBVT to compete vigorously in the doxorubicin market without having to go back and renegotiate for the basic raw material, bulk doxorubicin. This was particularly important since bulk doxorubicin is the most significant cost in finished doxorubicin. For example, in a 50 mg. vial of finished doxorubicin, the bulk accounted for an estimated 85% of manufacturing costs. Because of the way the pricing formula worked, Sicor and Alco had a direct continuing interest in all sales of CBVT's finished doxorubicin in the market.

14. Prior to April, 1991, when CBVT, encouraged by the Erbamont parties, breached the Supply and Distribution Agreements, the net sales price of CBVT's generic doxorubicin had declined substantially for customers. Plaintiffs were aware of this because the Alco/Sicor 50% share of revenues declined from $1,600,000 per kilo in June 1989 to $849,000 per kilo in June 1991.

15. Sicor and Alco let the Cetus parties know that they would be able to support a continued decline in the price of finished doxorubicin.

16. In September, 1990, a temporary injunction was issued in Italy at the behest of Farmitalia, which resulted in the shutdown of Sicor's doxorubicin production facility. Sicor and Alco contacted Mercian Corporation, a company with which the Plaintiffs had a friendly relationship. Mercian is one of the few producers of bulk doxorubicin in the entire world which produces doxorubicin of a quality acceptable to the FDA for sale in

the U.S. market. In addition, Mercian had already received FDA approval for its production of bulk doxorubicin.

17. Mercian, which had not previously entered the U.S. market (and which I understand has not done so to this day) indicated an interest in so doing by selling to CBVT through Sicor.

18. Representatives of CBVT and Cetus indicated to Mercian in my presence that Mercian was an acceptable supplier and that CBVT wanted to proceed to obtain FDA clearance to market finished doxorubicin made from Mercian bulk. No one at CBVT or Cetus gave any indication that they were not going to proceed with Mercian bulk until a March 17, 1991, meeting which I attended at which Cetus announced its agreement with Erbamont.

19. Sicor purchased 220 grams of doxorubicin from Mercian which were shipped to CBVT on January 25, 1991. This shipment was made to provide ample time for batch testing and preparation of the FDA application for the sale of the finished product. The filing was to be made shortly after April 10, 1991 when an Erbamont process patent on doxorubicin expired. Cetus never informed Sicor that the FDA application would not be fully ready for filing shortly after this date.

20. As a result of Erbamont's interference with Sicor and Alco's finisher and with the signing of an exclusive supply contract for doxorubicin between

Erbamont and Cetus, both Sicor and Mercian were effectively eliminated as sellers in the U.S. market. On information and belief, CBVT likely retains Sicor bulk and finished doxorubicin in inventory which it has not sold and will not sell because of CBVT's agreement with Erbamont. Certainly Cetus or CBVT have not made an accounting of their still existing inventory of Sicor doxorubicin.

21. The shortage of suppliers is no accident. Immediately upon the expiration of the product patent, Erbamont took a number of steps within the U.S. and in Italy to prevent Sicor, Mercian and Meiji from competing with it. These steps included attempts to have the FDA bar Sicor products on the basis of alleged quality defects, threatening to file or filing a series of patent infringement actions in the U.S. and Italy, and the filing of a Section 337 proceeding before the United States International Trade Commission ("ITC") seeing to enjoin the importation and sale of bulk doxorubicin produced by Sicor and Meiji and finished doxorubicin by CBVT and Bristol-Myers Company in the United States.

22. With respect to the various patent infringement suits by Erbamont, it is important to note that thus far not a single Court or agency in the United States or in Italy has issued any finding of infringement of any Erbamont patent relating to doxorubicin. In October 1990, the ITC ruled that there was no violation of Section 337 by Sicor or others. The FDA fully approved Sicor doxorubicin for sale in the U.S.

23. The contract with Cetus in which Erbamont stole away Sicor's only U.S. distributor, and the attendant settlement had the effect of limiting a planned challenge by Cetus to a patent for doxorubicin in solution form belonging to Farmitalia.

24. Other actions by Erbamont included:

(1) the filing of charges that counterfeit bulk doxorubicin was being sold under the Erbamont label (an accusation that was thoroughly disproved and discredited as to Sicor, which was investigated but not charged);

(2) accusations that Sicor had stolen from Erbamont the daunorubicin producing microorganism used in the production of Sicor's doxorubicin (once again disproved by the evidence and dismissed by the Italian Court on June 26, 1991, when Sicor was permitted to resume fermentation of daunorubicin); and

(3) soon-to-be-resolved accusations that Sicor had stolen Erbamont's trade secrets relating to the production of doxorubicin.

25. The net effect of Erbamont's signing an exclusive supply contract with Cetus has been to eliminate two of the only three companies in the world other than Erbamont which have the requisite FDA clearance to market bulk doxorubicin in the United States.

I declare under penalty of perjury under the laws of the United States of America that each of the foregoing statements is true and correct.

Executed this 9th day of September, 1992, in Washington, D.C.

//S//
Michael D. Cannon